



December 17, 2021

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0609

Re: File No. S7-24-89; File SR-CTA/CQ-2021-03: Proposed Fees for Expanded Consolidated Market Data

Dear Ms. Countryman:

Investors Exchange LLC (“IEX”) is writing to comment on the proposed filing for fees for expanded consolidated market data (the “Fee Filing”) that was approved by a majority of self-regulatory organizations (“Majority SROs”) that are participants in the Consolidated Tape Association, Consolidated Quotation, and Nasdaq UTP Plans (the “Plans”).¹ The participants in the Plans were jointly directed to file new fees for expanded “core data” as part of the Commission’s Market Data Infrastructure (“MDI”) reforms adopted last year.²

IEX believes that the Fee Filing is not approvable and should not be approved, as it clearly does not meet the standards that such fees must be fair, reasonable, and not unfairly discriminatory. We urge the Commission to promptly disapprove the Fee Filing so that further steps may be considered to best implement the MDI reforms.

Background

The MDI reforms included an expansion of the elements of “core data” required to be consolidated and disseminated to investors and other market participants so as to update these elements to better reflect modern trading needs and to better implement the purposes of the national market system. One of the most significant changes was to include as core data five depth-of-book price levels, in addition to the top-of-book (best bid and offer quotes from each exchange) currently included. The MDI reforms also required a change to the consolidation and delivery of core data from the existing monopoly securities information processors (“SIPs”) to a system of competing consolidators, in order to introduce competition and address conflicts of interest inherent in the current model.

The SEC charged the SROs with filing a set of fees that would apply to the purchase of expanded core data by competing consolidators and other market participants. In order to be approved, the fees must be shown to be fair, reasonable, and not unreasonably discriminatory. In its order, the Commission noted that it has consistently stated that a primary way of demonstrating that fees for core data are fair and reasonable would be to show that they are reasonably related to the costs of producing the data.³

¹ See Securities Exchange Act Release No. 93618 (November 19, 2021), 86 FR 67562 (November 26, 2021). The Majority SROs are comprised of exchanges that are affiliated with the NYSE, Nasdaq, and Cboe holding companies. IEX and other participants in the Plans did not approve the Fee Filing.

² See Securities Exchange Act Release No. 90610 (December 9, 2020), 86 FR 18596 (April 9, 2021) (the “MDI Order”).

³ *Id.* at 18685.

The SEC also said that it expects that fees for expanded core data would likely be lower than fees for equivalent data available through individual exchanges' proprietary data feeds today, on the assumption that core data fees would become subject to competitive pricing and that some participants would not need to subscribe to both consolidated and exchange proprietary market data products to receive expanded core data content.⁴ The Commission expected that lower fees for core data than for equivalent data obtained from exchange proprietary data feeds would drive demand for core data products. It also noted that the level of such fees would determine the ability of competing consolidators to offer products containing all elements of core data and also products containing only a subset of such data.⁵ In essence, a central purpose of the MDI reforms was to provide at least some market participants with a lower cost alternative to proprietary data feeds for low-latency, high-content data.⁶

Separately, the Commission clarified that it believed that competing consolidators should not be required to pay redistribution fees, given that competing consolidators by their nature would be engaged in the business of redistributing data and such fees would limit the ability of competing consolidators to compete, and therefore such fees would be difficult to reconcile with the requirement that fees for core data be fair, reasonable, and non-discriminatory.⁷

The SEC left it to the SROs to propose new fees and to determine how to justify them. In providing guidance as to how fees might be set and approved, it simply made clear that the fees needed to be shown to be consistent with the standards in the statute and the overall purpose of the MDI reforms.

Deficiencies in the Fee Filing

The Fee Filing not only ignores the Commission's guidance, on its face it fails the "fair, reasonable, and non-discriminatory" test. The following objections are not comprehensive but reflect some of the most glaring problems.

Cost Was Disregarded

IEX has long maintained that fees for both consolidated and exchange proprietary market data should bear a reasonable relationship to the cost of producing the data, and as noted above, relationship to cost is the one specific standard the Commission has endorsed as a way of justifying core data fees. IEX conducted a comprehensive study of its own costs to produce market data and connectivity products in January 2019 ("IEX Study").⁸ Recently, in connection with a filing proposing new market data fees, we updated this analysis.⁹

As described in detail in the IEX Study, the functions involved in providing market data and connectivity are very similar for all exchanges, and therefore we believe our own analysis is relevant to an

⁴ *Id.* at 18644, 18725.

⁵ *Id.* at 18752.

⁶ *Id.* at 18793.

⁷ *Id.* at 18685.

⁸ See IEX, "The Cost of Exchange Services" (January 2019), avail. at <https://iextrading.com/docs/The%20Cost%20of%20Exchange%20Services.pdf>.

⁹ See Securities Exchange Act Release No. 93557 (November 10, 2021), 86 FR 64268 (November 17, 2021) ("IEX Filing").

understanding of the costs and relative mark-up charged by other exchanges for their market data and connectivity products. The overall conclusion from our study is that the fees charged by the large exchange companies bear no relationship to any reasonable estimate of the cost of producing data and connectivity products. The IEX Study also showed how the economies of scale involved in providing market data and connectivity products further enable exchanges to extract excessive rents from market participants.¹⁰

The Majority SROs did not consider cost as a basis for setting fees or as a factor in evaluating whether they were fair and reasonable. This is true notwithstanding that the Commission specifically called out cost as a primary basis for justifying core data fees. The failure to even acknowledge the relevance of cost as a factor itself counts against the approvability of the proposed fees.

Faults in the Method Used to Set Fees for Depth of Book

The requirement that core data must include depth-of-book data at five aggregated price levels is a critical element of the MDI reforms. The Majority SROs determined pricing for depth-of-book by comparing the prices for three exchange proprietary top-of-book data products to the prices for three depth-of-book products by the same exchanges. Then, they took ratios produced by the three examples and averaged them. Finally, they multiplied existing per user SIP fees by the average ratio to set the per user fees for the new depth-of-book data.

To understand this methodology, consider the following professional per user fees for data products that were used from the Nasdaq and NYSE exchanges:

Exchange	Product	TOB Product Per Individual User	DOB Product Per Individual User	Ratio
Nasdaq	Nasdaq Basic/Nasdaq Total View	\$26	\$76	2.92
NYSE	BQT/NYSE Integrated	\$18	\$70	3.89

The average ratio from these two examples would be 3.4. Then, the Majority SROs added as another data point the 5 to 1 ratio between fees proposed by IEX on a per firm (not per individual user) basis for its TOPS and DEEP feeds.¹¹ Adding that ratio resulted in an average of the three examples of 3.94. The Majority SROs multiplied the existing per professional user fees charged for access to all three of the SIP networks (\$75) by 3.94, resulting in a monthly per professional user depth-of-book fee of \$296. They further applied the same 3.94 multiplier to existing prices for “non-display” use of SIP network feeds and fees for direct access to those networks, resulting in monthly charges of over \$37,000 and over \$29,000, respectively.¹²

¹⁰ IEX Study, at 33-34.

¹¹ See IEX Filing.

¹² Fee Filing, 86 FR at 67565.

There are many problems with this methodology, any one of which disqualifies it. For one, there was no effort made to justify why this methodology is reasonable or fair compared to other measures, including, for example, one based on a cost analysis. Even assuming that the general method chosen was appropriate, there was no effort to justify why the few data feeds used were appropriate comparisons, or better than others, or why more data points were not used.

A second fault is that the prices used were in fact clearly inappropriate reference prices. This is true, first, because the proprietary market data depth-of-book feeds that are referenced include top-of-book data as part of those offerings, but the Majority SROs are proposing to set fees for consolidated depth-of-book data that does *not* include top-of-book. Users buying the new core data would need to pay an additional surcharge for top-of-book data at current rates to obtain the same type of data content that is available today through existing proprietary data feeds. The Fee Filing makes no effort to adjust the methodology to account for this problem or even to acknowledge the problem. Thus, even if the general methodology made sense, the proposal would apply it in a way designed to be *less fair and more discriminatory* than would otherwise be the case.

Further, the Majority SROs used Nasdaq and NYSE proprietary data feeds that include full order-by-order depth of book, rather than the more limited depth information prescribed by the MDI Order. Many traders seek to acquire full depth-of-book data, and exchanges charge substantially more for those types of data feeds. The Majority SROs are therefore basing the multiplier on prices for premium products that contain more data than users would receive as part of core data. And they deliberately ignore pricing for other proprietary data feeds that are aggregated by price level and would therefore serve as a more logical proxy for setting core data fees. Once again, there is no attempt to correct for or even acknowledge this deficiency.

Further, the Fee Filing relies on new IEX fees as one of the comparison points, notwithstanding the differences from the other data fees that were selected. First, in the other cases, the comparison prices are individual professional user fees for existing SIP feeds compared to professional per user fees for exchange depth of book products. IEX's proposed fees do not include individual per user fees but apply only on a per firm basis for firms subscribing to "real-time" data, and IEX will not impose any additional or different fees depending on the type of use by those firms. The IEX fees also do not apply to data that is redistributed with a delay as little as 15 *milliseconds*, whereas other exchanges typically require a 15-*minute* delay to avoid standard charges for real-time data. In addition, the IEX fees were determined and justified based on a detailed analysis of IEX's costs to produce its data products.¹³ Again, there was no acknowledgement of these significant differences, or any attempt to adjust for them.

In fact, to the extent the IEX fees are relevant at all, a more consistent approach would be to reflect IEX fees as 0, since IEX is not charging any fees on an individual per user basis for either of the two data products. Taking that approach would substantially reduce the average ratio and multiplier (to 2.27), and thus substantially reduce the fees proposed to be charged for core data.

¹³ IEX Filing, 86 FR at 64270-73.

Redistribution Fees

The Majority SROs also proposed to charge redistribution fees to competing consolidators, notwithstanding the inconsistency between charging such fees and the purpose and structure of the MDI reforms, as emphasized by the Commission in the MDI Order. There is no way to explain that decision other than as further indication that the intent of the majority was to subvert the purpose of the Commission's order.

The Purpose is Clear

The net effect of the various choices made in the Fee Filing is to set fees for core data to a level that would likely be more expensive than if participants simply purchased proprietary data feeds.¹⁴ It seems clear this was the purpose -- to protect existing proprietary market data revenues by making data from competing consolidators prohibitively expensive and the business of competing consolidators non-viable.

Recommendation for SEC Action

The proposal as filed is not approvable, and we recommend that the Commission disapprove it quickly so that further action consistent with the purpose of the MDI reforms can be considered. We believe it is unlikely that the existing Plan governance will ever yield a replacement fee proposal that meets the objectives of the MDI Order. We propose instead that the Commission take action to reassign responsibility for the filing of such fees to the Operating Committee for the separate CT Plan, which the Commission required to have a different voting composition and governance structure.¹⁵ Because the formation of that Operating Committee and the operation of the CT Plan depends on resolution of pending litigation, progress on a fee structure that meets the Commission's public policy goals would regrettably be deferred. But at least the setting of fees would benefit from consideration by a broader set of voting stakeholders and a fairer and less conflicted governance structure. This latest unfortunate experience shows compellingly how badly those governance changes are needed.

Sincerely,



John Ramsay
Chief Market Policy Officer, IEX

¹⁴ See Letter from Adrian Griffiths, Head of Market Structure, MEMX LLC, to Vanessa Countryman, Secretary, SEC (November 8, 2021), at 7-9.

¹⁵ See Securities Exchange Act Release No. 92586 (August 6, 2021), 86 FR 44142 (August 11, 2021).